STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EV04RB-66711

Sekwanna Victor,	)	
	)	
Complainant,	)	
	)	**Administrative Action**
v.	)	**PARTIAL FINDING OF PROBABLE CAUSE**
	)	
CMG Food Services, Inc.,[1]	)	
	)	
Respondent.	)	

On February 1, 2018, Pennsylvania resident Sekwanna Victor (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that CMG Food Services, Inc. (Respondent), subjected her to differential treatment and denied her a promotion to a bartending position because of her race in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On January 30, 2019, Complainant amended her verified complaint to include color as a basis for discrimination, and to clarify that she had been denied employment rather than a promotion. The DCR investigation found as follows.

Summary of Investigation

Respondent operates various entities including, but not limited to, Skyline Diner, Breathless Men's Club, and Lookers Gentleman's Club (Lookers). Owned and operated by Chris and Manny Kontos, Lookers is an adult entertainment establishment located in Elizabeth, New Jersey that Respondent describes as providing artistic and fantasy dance entertainment to adult customers. In or around May 2016, Complainant began working as a dancer at Lookers.[2] She reported to managers Gary Griffin (white), who was responsible for Tuesday, Thursday, Saturday, and Sunday daytime shifts, as well as Monday and Wednesday evening shifts, and [redacted] (Black), who was responsible for Monday, Wednesday, and Friday daytime shifts, as well as Tuesday evening shifts. In addition, a third manager, Frank "Clint" Cui-Yu (Asian), was responsible for evening shifts Thursday through Sunday.

Complainant, who identifies as Black and has dark skin, alleged that Respondent refused to hire her as a bartender because of her race and color, and that it denied her the opportunity to work on high-volume, high-income yielding dancing shifts - such as weekend evenings - instead relegating her to lower-volume, lower-income yielding dancing shifts - such as daytime shifts or weekday evenings - because of same. Respondent denied the allegations.

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[1] In the original verified complaint, Complainant identified Respondent as "Lookers." The caption is hereby amended to reflect counsel's representation that Respondent's proper designation is CMG Food Services, Inc.

[2] In the verified complaint, Complainant alleged that she began working as a dancer at Lookers in December 2016. However, during the DCR fact-finding conference, she clarified that she started working as a dancer at Lookers in May 2016.

a. Failure to hire - bartending position

Complainant alleged that in September 2017, she approached Griffin and expressed interest in a bartending position for which she was qualified, but Griffin told her that there were no such positions available. She alleged that Respondent thereafter hired three light-skinned, Hispanic bartenders, J.A., N.I., and P.L., who were either less qualified or similarly qualified than she.

Records produced by Respondent indicate that N.I. and P.L. filled out and submitted employment applications on February 13, 2017 and January 21, 2017, respectively, but were not hired until December 2017. J.A. was hired on October 23, 2017. Respondent was unable to produce J.A.'s employment application.

During the fact-finding conference, Griffin stated that N.I. and P.L. were not hired until almost a year after they applied due to the high-demand nature of the position. He stated that when a prospective bartender applies for a position, she will typically have to wait for some period of time until there is a vacancy.[3]

Griffin denied that Complainant ever inquired about a bartending position. He stated that if she had, he would have directed her to office manager Christina Kontos, who would have provided Complainant with an employment application. Complainant confirmed that she never filled out an employment application for a bartending position. Cui-Yu and Chris Kontos denied ever being informed that Complainant was interested in a bartending position and Complainant was unable to identify any witnesses, or produce any evidence, to support her claim that she expressed interest in a bartending position.

Personnel records produced by Respondent suggest that during the relevant period, five of Respondent's 29 bartenders were Black. It also employed a Black shift manager ([redacted]), and at least four Black security guards.

b. Differential treatment – dancing shifts

According to Respondent, its dancers are not employees; rather they are independent contractors who lease stage time pursuant to an Entertainer Lease Agreement (ELA). Stage times available for lease are 12 p.m. to 6 p.m. and 6 p.m. to 2 a.m. or 3 a.m.[4] Shifts are assigned on a first-come, first-served basis. Dancers retain their assigned stage times for an indefinite period until the dancer's availability changes or either party terminates the dancer's ELA. Respondent does not pay its dancers a salary; rather, dancers exclusively earn cash tips. Complainant denied that Respondent ever provided her with an ELA, and Respondent was unable to produce it. However, Complainant agreed that she was an independent contractor, not an employee.

During the DCR fact-finding conference, Griffin estimated that between 14 and 18 dancers perform on his shifts and [redacted] shifts, while Cui-Yu estimated that between 16 and 20 dancers perform on his shifts. Complainant did not dispute the accuracy of these figures. Cui-Yu stated that he creates the dancer schedule for his shifts on a quarterly basis – i.e., every three months –

[3] Complainant told DCR that she voluntarily stopped working for Respondent in February 2018.
[4] Lookers is open until 2 a.m. Sunday through Wednesday, and 3 a.m. Thursday through Saturday.

and that the schedule is communicated to the dancers either verbally or via text message. Griffin stated that he creates the dancer schedule for his shifts on a monthly basis.

During the fact-finding conference, Complainant stated that she was generally scheduled to work daytime shifts on Tuesday, Thursday, Saturday, and Sunday. In addition, she estimated that she worked roughly eight Monday evening shifts and two Wednesday evening shifts during her time with Respondent. However, she stated that she was never scheduled to work on Cui-Yu's evening shifts – Thursday through Sunday. Respondent did not produce scheduling records to confirm or refute Complainant's statement, but acknowledged that Complainant was never scheduled to work a Thursday, Friday, Saturday, or Sunday evening shift.

Complainant alleged that on several occasions throughout her time as a dancer at Lookers, most recently on or about September 10, 2017, she approached Cui-Yu and inquired about modifying her schedule so that she would be able to dance on some of his shifts, which are generally Respondent's highest income-yielding shifts.[5] However, she contended that Cui-Yu continuously informed her that his shifts were full and that he would thus be unable to consider her request. Complainant alleged that Cui-Yu's reason for refusing to consider her request is merely pretext for discrimination. Specifically, she alleged that she witnessed at least five new non-Black, light-skinned dancers assigned to Cui-Yu's shifts after she made her requests.

During the fact-finding conference, Cui-Yu acknowledged that Thursday through Sunday evenings are typically Respondent's highest grossing shifts. He also acknowledged that Complainant inquired about being scheduled to dance on his shifts on multiple occasions, and that he informed her that those shifts were currently full. He stated that while it is possible that five non-Black, light-skinned dancers performed on these shifts after he informed Complainant that they were full, those dancers would only have been assigned to those shifts if they were either next in line on the "waiting list," or were simply potential new dancers who were auditioning to lease stage time.

However, Respondent did not produce any such waiting list, or any records with respect to which dancers worked on Cui-Yu's shifts, and when each dancer had first requested placement on same. Further, DCR asked Respondent on three occasions to produce records with respect to the racial breakdown of its dancer staff by shift, so that it could determine whether there was a correlation between dancers of certain races and the shifts they were assigned to. On each occasion, Respondent refused.

On Friday May 3, 2019, a DCR Investigator entered Lookers at 9:15pm and remained until approximately 10:35pm. During that time period, the investigator observed 26 total dancers. Eight (8) had light skin complexions and appeared to be Hispanic; eight (8) had light skin complexions and appeared to be white; nine (9) had light brown skin complexions and appeared to be Hispanic; one (1) had dark brown skin complexion and appeared to be Hispanic. No dancer observed appeared to be Black.

[5] During a DCR interview, Complainant estimated that the difference between the amount of income earned on a weekday daytime shift and a weekend evening shift is roughly between $200 and $300 per shift.

Analysis

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. If the Director determines that probable cause exists, the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). If, on the other hand, the Director finds there is no probable cause to believe the LAD has been violated, that finding is a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

a. Failure to hire – bartending position

The LAD makes it unlawful for an employer to refuse to hire an individual based on that individual's race or color. N.J.S.A. 10:5-12(a). As a threshold matter in such cases, Complainant must demonstrate that she applied for the position that she claims Respondent unlawfully denied her. Complainant told DCR that she never submitted an employment application for the bartending position. Instead, Complainant alleged that she approached her manager, Griffin, and expressed interest in a bartending position. She alleged that Griffin advised her that there were no such positions available, but that Respondent thereafter hired three similarly qualified, non-Black, light- skinned bartenders. DCR's investigation confirmed that Respondent hired J.A., N.I., and P.L. - all of whom are Hispanic - in late 2017. However, Respondent and Griffin denied that Complainant ever inquired about becoming a bartender, and Complainant was unable to identify any witnesses or produce any evidence to support her allegation that she did in fact inquire about a bartending position. Because it is undisputed that Complainant never applied for the position she claims Respondent unlawfully denied her, and because there is no evidence to support her assertion that she inquired about such a position, the Director finds that there is **NO PROBABLE CAUSE** to credit Complainant's allegation of failure to hire based on race and color. This finding of no probable cause is a final agency action, subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

b. Differential treatment – dancing shifts

The LAD makes it unlawful for an employer to discriminate against an employee in the terms, conditions, or privileges of employment based on race and color. N.J.S.A. 10:5-12(a).

Complainant's amended verified complaint alleged that Respondent engaged her as an independent contractor, and Respondent's answer did not deny that allegation. Despite the parties'

apparent agreement on this issue, the DCR investigation revealed evidence of an employer-employee relationship between the parties. Specifically, in Pukowsky v. Caruso, 312 N.J. Super 171, 180 (App. Div. 1998), the Court set forth its test to determine whether a plaintiff qualified as an employee for purposes of LAD liability. Here, the DCR investigation found that Respondent met the first and most important element of the Pukowsky standard, because it controlled the "means and manner of [Complainant's] performance" during the period of her work assignments. Respondent also met other elements of the Pukowsky standard. Specifically, Respondent owned the premises where Complainant danced, and the work performed by Complainant was an integral part of Respondent's business. In light of these factors, the Director finds that for purposes of this disposition, Respondent qualifies as Complainant's employer pursuant to N.J.S.A. 10:5-12(a). See also Dance, Inc. v. New Jersey Dep't of Labor & Workforce Dev., 2019 N.J. Super. Unpub. LEXIS 95, certification denied by 2019 N.J. LEXIS 760 (N.J. May 28, 2019)(exotic dancers working only for tips and subject to a "Stage Rental/License Agreement" were employees and not independent contractors under New Jersey's unemployment compensation statute).

In addition, even if Respondent could successfully prove that it was not Complainant's employer under Pukowsky, the LAD also makes it unlawful to refuse to lease to, or contract with, any person based on race or color. N.J.S.A.10:5-12(l). In this context, because Respondent stated that its dancers "lease" stage time at its place of business - even referring to its dancer contracts as "Entertainer *Lease* Agreements" (emphasis added) - Respondent's refusal to place Complainant on more lucrative shifts due to her race and/or color would be unlawful, as Respondent would effectively be refusing to lease space to Complainant during prime shifts for discriminatory reasons.

Complainant alleged that when she asked Cui-Yu if she could be scheduled on the more lucrative Thursday through Sunday evening shifts, Cui-Yu informed her that no such shifts were available. She further alleged that she thereafter witnessed at least five new dancers, none of which were Black and/or dark-skinned, dancing on those "unavailable" shifts. Cui-Yu did not deny Complainant's assertion; rather, he offered possible reasons for why that could have been so. Specifically, he stated that some, or all, of these alleged new dancers could have inquired about Cui-Yu's shifts before Complainant had, and thus, were next on the "waiting list." He also suggested that the new dancers could have been prospective dancers merely auditioning to lease stage time. However, neither Cui-Yu nor Respondent were able to support this claim with any documentary or other evidence. Indeed, Respondent never produced the purported "waiting list" or any documentation of how its dancers auditioned. In the absence of any such records, Respondent's assertion that it "auditions" new dancers during its peak periods is suspect.

Because Respondent was either unwilling or unable to produce responsive records to support its purported legitimate, non-discriminatory business reason for denying Complainant the opportunity to work on its most lucrative shifts (i.e., that Respondent had no vacancies on those shifts), DCR was unable to verify its assertions in that regard.

Moreover, DCR requested records of the racial breakdown of the dancers on Respondent's various shifts in order to ascertain whether Respondent only scheduled dancers of certain races to certain shifts, but Respondent refused to produce them. And a DCR Investigator entered Lookers on a Friday night and observed 26 total dancers, none of which appeared to be Black.

Thus, the Director is satisfied at this preliminary stage of the process that there is **PROBABLE CAUSE** to support Complainant's allegation of race and color-based differential treatment, and that the matter should "proceed to the next step on the road to an adjudication on the merits," Frank, supra, 228 N.J. Super. at 56.

Date: October 18, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights